SUPREME COURT, U. S.

FILED
MAY 12 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1383

JACK L. ROACH,

Petitioner,

—v.—

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

MELVIN L. WULF
156 Fifth Avenue
New York, New York 10010
Attorney for Petitioner

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statement of the Case	2
Reasons for Granting the Writ	8
Conclusion	12
Appendix—Order of the Chief Justice of the Supreme Court of Connecticut	13

Authorities Cited:

Cases:

Bantam Books v. Sullivan, 372 U.S. 58 (1963)	8
Burstyn v. Wilson, 343 U.S. 495 (1952)	8
Carroll v. President and Commissioners, 37 L.W. 4041 (November, 1968)	11
Congress of Racial Equality v. Douglas, 318 F.2d 95 (5th Cir. 1963), *cert. denied sub nom.* Congress of Racial Equality v. Burt, 375 U.S. 829 (1963)	11
Connally v. General Const. Co., 269 U.S. 385 (1926)	8
Dombrowski v. Pfister, 380 U.S. 479 (1965)	8

PAGE

Fields v. Fairfield, 375 U.S. 248 (1963) 11

Garrison v. Louisiana, 378 U.S. 64 (1964) 10

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 8

Near v. Minnesota, 283 U.S. 697 (1931) 8
New York Times v. Sullivan, 376 U.S. 254 (1964) 9

Roth v. United States, 354 U.S. 476 (1957) 9

United States v. Robel, 389 U.S. 258 (1967) 8

Walker v. Birmingham, 388 U.S. 307 (1968) 10

Constitutional Provision:

United States Constitution:

First Amendment 2, 7, 8, 11

Statutes:

Conn. Gen. Stat. Sec. 52-265(a) 7

De Scandalis Magnatum 10

28 U.S.C. §1257(3) 1

Other Authorities:

Brant, The Bill of Rights (1965) 91 10

Chaffee, Free Speech in the United States (1946) 326-342 11

Frankfurter and Green, The Labor Injunction 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

JACK L. ROACH,

Petitioner,

—v.—

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Connecticut entered in the above entitled case on February 28, 1969.

Opinions Below

The order of the Chief Justice of the Supreme Court of Connecticut denying petitioner's application for an appeal is unreported and is printed in the Appendix, *infra*. There was no opinion of the Superior Court.

Jurisdiction

The order of the Chief Judge of the Supreme Court of Connecticut denying petitioner's appeal was entered on February 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

Question Presented

Whether a temporary injunction, issued after hearing, forbidding petitioner from "making public comments or stating opinions" which are "malicious or obscene" or from carrying signs on the premises of the University of Connecticut which carry statements or comments which are "untrue, malicious, or calculated to incite or encourage others to do or participate in unlawful acts," violates the First Amendment.

Statement of the Case

On January 30, 1969, the State of Connecticut, by its Attorney General, initiated a civil proceeding against petitioner, a tenured associate professor of the University of Connecticut, which sought "A temporary and permanent injunction restraining Defendant from any act which might impair or prevent the accomplishment of any lawful activity, process or function of the University of Connecticut, including the disruption of placement interviews and unlawful entry into or upon buildings of the University of Connecticut" and "Such other relief as in law and equity may have pertained" (Complaint, p. 2).

The substance of the complaint was as follows (Complaint, pp. 2-3):

> "On October 30, 1968, November 26, 1968, January 15, 1969, and January 25, 1969, the defendant Roach did impair the lawful activities, processes and functions of the University of Connecticut in Mansfield, or did enter unlawfully into or upon buildings of the University for such purposes."

"The Defendant has repeatedly indicated his disregard for the lawful requirements of the General Statutes and of the University of Connecticut regarding conduct on the campus of said University, and has repeatedly disrupted lawful University activities."

"The Defendant's continued disruption of lawful University activities will greatly impede its functions and is otherwise illegal and contrary to the public policy of the State of Connecticut."

An Order to Show Cause was issued and a hearing on the application for a temporary injunction was held in the Superior Court, Tolland County, on February 4-5, 1969, at which petitioner appeared with counsel.

At the opening of the hearing, petitioner's counsel, on a motion to dismiss the temporary injunction, argued, among other grounds, that:

" . . . the relief which the plaintiff seeks clearly violates the constitutional rights of the defendant as contained in the First and Fourteenth Amendments. The relief is so broad it affects not only activity by speech, and pure speech, which is a prior restraint under Near and Minnesota. Second, it is so vague it does not adequately describe the prohibited act, and, third, it does not give the defendant an opportunity to protest or demonstrate which in a recent case in December 1968 by the Second Circuit of the Federal Court System said it is an absolute right of the defendant" (T. 4).[1]

The motion to dismiss was denied (T. 7).

---

[1] The symbol "T" refers to the transcript of the hearing on the preliminary injunction which is part of the Record but separately paginated.

The events leading to the proceeding against petitioner grew out of four incidents on the campus of the University of Connecticut.

On October 30, 1968, placement interviews conducted by the Dow Chemical Company were interrupted and by "a large crowd" which gathered in the interview room making it impossible for the placement interviews to be conducted because of the noise being made (T. 14-15). Petitioner was among those in the room (T. 15) but he was not seen to be noisy (T. 38). He was standing in the room (T. 35) at the rear of the crowd (T. 49-50).

On November 26, 1968, placement interviews were held by the Olin Mathieson Company in a residence on campus (T. 15-16). A demonstration was held by 200-300 people (T. 47) outside the residence (T. 17-18). Petitioner was present (T. 18, 28). At one point he was seen attempting to mount the railing of the porch (T. 18). A state's witness said only that he saw petitioner at the top of the stairs leading up to the building's porch (T. 47). There was a brief disturbance at the top of the stairs when petitioner was either pushed or slipped (T. 47, 79). The crowd became excited but petitioner turned and said, "No. I slipped. I wasn't pushed. I slipped. It's Okay" (T. 47, 79). His explanation quieted the crowd (T. 79).

The activities did not interfere with the interviews being held inside the residence (T. 40) and all the scheduled interviews were completed (T. 39). Though rocks and bricks were thrown at the building (T. 39), there was no claim that petitioner had thrown any (T. 39-40).

The third event took place on January 15, 1969 in and around Gulley Hall during the course of a meeting of the

University's Board of Trustees (T. 33-34). The demonstration consisted of a march with picket signs around the Hall (T. 86-88).

Four or five people (T. 34) climbed a fire escape outside the room where the Board was meeting and shouted and pounded on a door leading into the room where the meeting was being held (T. 34). The people were on the fire escape less than five minutes (T. 56) and their activity resulted only in "a pause" in the meeting (T. 41), not its adjournment (*ibid.*).

Petitioner was one of those on the fire escape (T. 53). He was seen to stamp his feet on the fire escape but wasn't seen to shout (*ibid.*). He was on the fire escape "half a minute, probably less than that" (T. 92). He went up the fire escape to tell the students there to come down (T. 85, 91).

Petitioner testified that he had "assembled with a group of around twenty students and faculty for the purpose of a non-obstructive demonstration outside of Gulley Hall" (T. 84). The purpose of the demonstration was "to protest the fact that we [a number of faculty members] would not be given the opportunity of an open hearing on our cases [concerning disciplinary action]" (*ibid.*). The demonstrators found that they were not to be permitted to attend the meeting though it was "a regular meeting of the Board of Trustees, and by their regulations these are open meetings" (T. 84-85). They were kept out by the police (*ibid.*) until it was learned by one of the administrators that the doors to the meeting room had been locked (T. 77).

The last relevant event took place on January 25, 1969 during a special meeting of the Board of Trustees "called

for the purpose of a hearing for four staff members" (T. 34). It too was held at Gulley Hall (*ibid.*). On that occasion the disturbance consisted of mud balls thrown at the windows of the Hall and noise on the fire escape (T. 34-35).

Petitioner was present at this demonstration. He was, according to a state's witness, only "carrying signs, standing around and talking . . ." (T. 63-64). He was not on the fire escape (T. 40-41). He had been told not to go onto the fire escape and "to pass the word" (T. 94). That others were not to go onto the fire escape either.

When invited into the Board meeting, petitioner said "Tell the Board to go fuck themselves" (T. 95).[2]

On the basis of this evidence, a temporary injunction, in the following words, was issued upon the close of the hearing (T. 101-102):

> "These are, therefore, by authority of the State of Connecticut, to command and enjoin you and each of you, under penalty of fine of $1,000.00 from any act which might impair or prevent the accomplishment of any lawful activity, process, or function of the University of Connecticut, including the disruption of placement interviews and unlawful entry into or upon the buildings of the University of Connecticut.
>
> More particularly, the following acts are enjoined: Obstructing the entry of any building or approach

---

[2] A film taken by a television station on January 25th was viewed by the court (T. 68) over objection (T. 67). The film (Plaintiff's Exhibit C) depicted only a dispute between petitioner and a television news reporter (T. 67). It had no bearing on the day's events.

thereto on the University premises; entering any building on the University premises where entry is unauthorized or has been prohibited to him by those in authority; impeding the ingress or egress of authorized persons to any building on the University premises; any violence or threat of violence to anyone on the University premises; wilfully making any unnecessary noise or commotion calculated to disrupt, impede, or impair lawful activities on University premises; and inciting or encouraging others to do any of the aforesaid acts.

The following acts are not prohibited: Making public comments or stating opinions, if done in an orderly manner, free from threats and violence, and such are not malicious or obscene; and carrying signs on University premises stating certain facts or opinions, if done in an orderly manner, free from threats and violence and obstruction to buildings, their entrances, exits, and approaches; and such statements or comments are not untrue, malicious, or calculated to incite or encourage others to do or participate in unlawful acts."

Petitioner's motion at the close of the hearing to make the injunction permanent was denied (T. 103).

On February 19, 1968, petitioner made application for an appeal to the Supreme Court of Connecticut under Conn. Gen. Stat. Sec. 52-265(a). The appeal asserted that the temporary injunction violated the First Amendment on the ground that it was "ambiguous," and a "prior restraint" (Appeal of Defendant, p. 3). The appeal was denied on February 28, 1969.

Reasons for Granting the Writ

Certiorari should be granted in this case because the terms of the injunction under which petitioner must labor, unarguably violate the First Amendment. By its terms, petitioner, among other things, is forbidden from:

a) "making public comments or stating opinions" which are "malicious or obscene"; and

b) carrying signs on University premises which carry statements or comments which are "untrue, malicious, or calculated to incite or encourage others to do or participate in unlawful acts."

To forbid one from speaking untruths, making "malicious" statements, or utilizing "obscenity" in speech, not only forbids conduct in terms which are too vague or overbroad. In addition, it is a prior restraint on pure speech itself, a burden which is forbidden by the First Amendment. *Near* v. *Minnesota,* 283 U.S. 697 (1931); *Burstyn* v. *Wilson,* 343 U.S. 495, 504 (1952); *Bantam Books* v. *Sullivan,* 372 U.S. 58 (1963).

The injunction's language is of course also void for vagueness for it restricts petitioner's speech "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . " *Connally* v. *General Const. Co.,* 269 U.S. 385 (1926). Likewise, the injunction is overbroad, for "it is plainly susceptible of sweeping and improper application." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 599 (1967). See also *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); *United States* v. *Robel,* 389 U.S. 258 (1967).

One would not have thought that a court through the injunctive power, any more than a legislature through the legislative power, could validly make departure from the "truth" in political affairs a criminal offense.[3] Of course, one can be held liable civilly for making libelous statements with malice against public officials,[4] and for making libelous statements against private persons as provided by state law. But the injunction here does not prohibit petitioner from making untruthfully or maliciously about individual persons. Rather, it forbids his making any such statements relating to University affairs[5] including, presumably, statements concerning the University of Connecticut as an institution and its administration, the structure of the Connecticut and federal governments, the nature of economic relations, directions to reach Gulley Hall, or the time of day.[6]

---

[3] Excepting, of course, statements made under oath.

[4] *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

[5] Read literally, the last paragraph of the injunction is not confined to University affairs. However, it was probably not the intention of the court to prohibit petitioner from speaking untruthfully, maliciously, or obscenely on any subject anywhere in the world.

[6] The terms "untrue" and "malicious" are related disjunctively in the injunction. We have related them conjunctively here only to show that even then they prohibit speech which is constitutionally protected. Of course, in the disjunctive, the terms constitutionally have no arguable validity whatever. Furthermore, it is questionable whether the word "maliciously" is even used in the artful constitutional sense.

It is also doubtful that the injunction intended the use of the word "obscenity" in its constitutional sense, as "material which deals with sex in a manner appealing to prurient interest." *Roth* v. *United States*, 354 U.S. 476, 487 (1957). Surely petitioner's reply to the invitation extended him to attend the meeting of the Board of Trustees could by no stretch of the imagination be said to appeal to anyone's "prurient" interest. Of course pruriency in the *Roth* sense is never involved in political speech.

As written, the injunction bears a remarkable relationship to the statute *De Scandalis Magnatum* issued in 1275 in the reign of Edward I:

> "That from henceforth none be so hardy to cite or publish any false news or tales whereby discord or occasion of discord or slander may grow between the King and his people or the great men of the realm; and he that doth so shall be taken and kept in prison until he hath brought him into the court which was the first author of the tale." [7]

The consequences of the injunction are manifest. Petitioner is incapacitated from speaking out on a wide variety of subjects of public interest because of the breadth of the injunction. No matter how judiciously he may choose his words, the court below may find them untrue, if not malicious or obscene. Petitioner would then be put to the pains of a contempt prosecution with only an arguable right to challenge the underlying validity of the injunction. See *Walker* v. *Birmingham,* 388 U.S. 307 (1968). The more prudent course, therefore, is for petitioner to say nothing rather than risk one or more prosecutions for contempt. Could the chilling effect of the injunction be any plainer?

Mr. Justice Black anticipated the case at bar when he said in *Garrison* v. *Louisiana,* 378 U.S. 64, 79 (1964) (concurring):

> "I believe that the First Amendment, made applicable to the States by the Fourteenth, protects every person from having a State or the Federal government fine, imprison, or assess damages against him when he has

[7] Brant, The Bill of Rights (1965) 91.

> been guilty of no conduct . . . other than expressing an opinion, even though others may believe that his views are unwholesome, unpatriotic, stupid or dangerous."

The use of the injunction to regulate campus demonstrations is increasingly being utilized by university administrators. In earlier days injunctions have been used to cripple trade unions (see Frankfurter and Green, The Labor Injunction, *passim*; Chafee, Free Speech in the United States (1946) 326-342); and to hobble the civil rights movements in the South (see, e.g., *Congress of Racial Equality* v. *Douglas*, 318 F.2d 95 (5th Cir. 1963), *cert. denied sub nom. Congress of Racial Equality* v. *Burt*, 375 U.S. 829 (1963)). It has also been utilized to interfere with the First Amendment rights of those opposed to racial equality. See *Fields* v. *Fairfield*, 375 U.S. 248 (1963); *Carroll* v. *President and Commissioners*, 37 L.W. 4041 (November 19, 1968).

The injunction is a powerful weapon which has historically been the object of judicial abuse. If not closely supervised by this Court to assure compliance with constitutional requirements, the abuses are bound to multiply. They are also bound to encroach upon First Amendment rights unless the lower courts are forcefully reminded, whenever the occasion demands, that:

> "An order issued in the area of the First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll* v. *President and Commissioners*, 37 L.W. at 4043.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.

Attorney for Petitioner

May 12, 1969

APPENDIX

SUPREME COURT OF CONNECTICUT

No. 12395 State of Conn. v. Jack Roach 2/28/69

February 26, 1969 The application of the defendant for certification by the Chief Justice, under § 52-265a of the General Statutes of a purported appeal to the Supreme Court from (1) the granting of a temporary injunction by a judge of the Superior Court, and (2) the denial of the motion of the defendant, made immediately after the issuance of a temporary injunction that it be made permanent, is denied.

King, Chief Justice

MOTION TO DISMISS

PREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 10 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1387

JACK L. ROACH

Petitioner,

— v. —

STATE OF CONNECTICUT,

Respondent.

MOTION OF RESPONDENT TO DISMISS

ROBERT K. KILLIAN
Attorney General
State of Connecticut
30 Trinity Street
Hartford, Connecticut

Attorney for Respondent

INDEX

	Page
Motion to Dismiss	1
Brief in Support of Motion	1
Conclusion	7
APPENDIX — Respondent's Motion to Dismiss	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. _____

JACK L. ROACH,

Petitioner,

— v. —

STATE OF CONNECTICUT,

Respondent.

MOTION OF RESPONDENT TO DISMISS

I.

The respondent State of Connecticut respectfully moves to dismiss the above appeal on the ground that there has been no final judgment or decree in this case by the supreme court of Connecticut.

II.

BRIEF IN SUPPORT OF MOTION

Page 1 of the petition for certiorari addressed to this Court states that "the jurisdiction of this court is invoked under 28 U.S.C. Section 1257 (3)."

The first sentence of section 1257 states that "*Final judgments or decrees* rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . ." (Underlining respondent's own).

It is submitted that no "final judgment or decree" has yet been rendered by the supreme court of Connecticut.

The procedural background outlined in the Petition for a Writ of Certiorari presents a mere skeletal view of the action in the Connecticut Courts. What in fact transpired was a procedurally commonplace type of litigation, i.e., a civil complaint alleging a pattern of misconduct leading to irreparable injury with a prayer for a temporary and permanent injunction. The action was initiated on January 30, 1969 and hearing was held under a show cause order on February 4-5, with a temporary injunction issuing on the latter date.

The next step of petitioner herein was to appeal to the supreme court of Connecticut pursuant to Connecticut General Statutes Sec. 52-265a. The precise wording of this statute is revealing:

> "DIRECT APPEAL ON QUESTIONS INVOLVING THE PUBLIC INTEREST. Notwithstanding the provisions of section 52-264 and 52-265, any party to an action who is aggrieved by an order or decision of the superior court or the court of common pleas, which action involves a matter of substantial public interest and in which delay may work a substantial injustice, may appeal under this section from such order or decision, stating therein the question of law on which the appeal is based, to the supreme court within two weeks from the date of the issuance of such order or decision. The chief justice shall, within one week of receipt of the appeal, rule whether the issue involves a substantial public interest and whether delay may work a substantial injustice. Upon certification by the chief justice that a substantial public interest is involved and that delay may work such an injustice, the trial judge shall forthwith transmit a certificate of his decision, together

with a proper finding of fact, to the chief justice, who shall thereupon call a special session of the supreme court for the purpose of an immediate hearing upon the appeal. The chief justice may make orders to expedite such appeals, including orders specifying the manner in which the record on appeal may be prepared."

It is noted that petitioner failed to include the wording of this statute in his petition for certiorari. The reason for this apparent oversight is obvious. Even a cursory review of the Connecticut statute demonstrates that its purpose is to provide expedited procedure for causes which, in the opinion of the chief justice of the supreme court of Connecticut, involve matters of "substantial public interest" and in which delay may work "a substantial injustice." Petitioner sought by his purported appeal to convince the chief justice that his was such a cause. In this he was unsuccessful, and is thus relegated to the normal appeal provisions provided for in Chapter 902 of the Connecticut General Statutes, in particular Section 52-263 thereof which provides:

"APPEALS FROM SUPERIOR AND COMMON PLEAS COURTS. Upon the trial of all matters of fact in any cause or action in the superior court or the court of common pleas, whether to the court or jury, or before any judge thereof when the jurisdiction of any action or proceeding is vested in him, if either party is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial, including the denial of a motion to set aside a verdict, he may appeal from the final judgment of the court or of such judge, or he may appeal from the decision of the court granting a motion to set aside a verdict, to the supreme court."

At no time did the chief justice or the supreme court of Connecticut have an opportunity to adjudicate the substan-

tive issues of petitioners cause. The only question before the chief justice was whether the matter was of sufficient moment to warrant invoking the expedited procedures of Sec. 52-265a. The chief justice having decided this in the negative, the petitioner was placed in the same position as any other appellant from a decision of the Connecticut superior court. He had and has available to him the tested procedures provided by the Connecticut statutes which insure a thorough and orderly review of the lower court's determination.

Section 52-265a was adopted by the 1967 Session of the Connecticut General Assembly. It was the intent of the legislation that this remedy would be invoked infrequently, and then only in cases of clear and pursuasive public interest. Indeed, the very efficacy of the statute depends in large measure on restrained judgments by the chief justice. Were he to permit ready use of its procedures, the very expeditiousness of its design would be threatened by an increasing number of these privileged matters. Petitioner's position in this case would force just such a situation. Consider the dilemma faced by the chief justice if an appeal to the United States Supreme Court were permitted from the exercise of his discretion as provided in Section 52-265a. In the future disappointed litigants in the superior court could ignore the normal appeal procedures and invoke Section 52-265a. The chief justice would then have to grant the request or have the matter be the subject of an appeal to the United States Supreme Court. In effect, the chief justice would have to accede to these appellants or forego appellate review by the Connecticut court. Certainly it was never the intent of the legislature to create such an impossible situation. And with equal certainty then, neither the legislature nor the chief justice intended that his denial of expedited procedures would constitute a substantive disposition by the supreme court, i.e., would be a final decision or decree.

It should be emphasized that the respondent has no wish to foreclose consideration of any of the substantive issues raised by the petitioner. However, this review should be first by the Connecticut supreme court. In order to assure an orderly progression through the appeal procedures in Connecticut, respondent has already filed with the supreme court of Connecticut an appropriate motion to have the petitioner file an assignment of errors so that the essential and mandatory record may be developed to aid that court in its deliberations. See appendix. Until such filings are made, further consideration by any appellate tribunal is premature.

It is submitted that this aproach is not only sound, but essential to the orderly administration of justice in a federal system. As Mr. Chief Justice Vinson has pointed out regarding the role of the United States Supreme Court:

> "Congress has limited our power to review judgments from state courts lest the Court's jurisdiction be exercised in piecemeal proceedings to render advisory opinions. Were our reviewing power not limited to 'final' judgments, litigants would be be free to come here and seek a decision on federal questions which, after later proceedings, might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation." *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 381, 382 (1952).

These words have relevance to the instant proceeding. Petitioner has a clear route to follow to secure an appropriate judicial review of his allegations. The process is elemental. The proper method for raising these questions is, ". . . by appeal, after a hearing on the merits and final judgment. . . .". *NAACP U. Alabama*, 357 U.S. 449, 467 (1957). It is only after satisfying these requirements that the jurisdiction of the United States Supreme Court may be invoked. *Construc-*

tion Laborers v. *Curry,* 371 U.S. 542, 548-551 (1962); *Pope* v. *Atlantic Coast Line R. Co.* supra; *Richfield Oil Corp.* v. *State Board,* 329 U.S. 69, 72-74 (1946). In pursuing his petition for certiorari the petitioner in effect asks the United States Supreme Court to preclude consideration of the matter by the appellate tribunal in Connecticut. Respondent's instant motion to prevent such a tactic is more than a mere technical objection. It is rather a matter of fundamental relationships within the federal system. In fact, this precise point was recognized by the United States Supreme Court in the case of *Building Union* v. *Ledbetter Co.,* 344 U.S. 178, 180 (1952):

> "The provision of § 1257 that only 'Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . .' has been carried in almost identical language since the Judiciary Act of 1789, 1 *Stat.* 85, § 25.
>
> 'This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.' *Radio Station WOW* v. *Johnson,* 326 U.S. 120, 124."

As a final point it should be noted that the only decree in this case is for a temporary injunction, which is not considered a final judgment or decree appealable to the Connecticut supreme court.

Olcott v. *Pendleton,* 128 Conn. 292, 22 A. 2d 633 (1941). In fact, petitioner has not even filed an answer in the superior court.

For the above reasons respondent has taken no position on the substantive allegations of the petition for certiorari. However, the observation is inescapable that the cause of constitutional rights in the long run is better served by stout

defense of the law rather than by slights of libertarian rhetoric. As Mr. Justice Frankfurter wisely commented, "The history of American freedom is, in no small measure, the history of procedure." *Malinski* v. *New York*, 324 U.S. 401, 414 (1944).

CONCLUSION

For the foregoing reasons, the respondent claims there has been no final judgment or decree by the Supreme Court of Connecticut and hence jurisdiction has not been established pursuant to 28 U.S.C. 1257 (3). Therefore, respondent requests that its Motion to Dismiss be granted.

ROBERT K. KILLIAN
Attorney General
State of Connecticut
30 Trinity Street
Hartford, Connecticut

Attorney for Respondent

APPENDIX

No. 12395
STATE OF CONNECTICUT
v.
JACK L. ROACH

SUPREME COURT
STATE OF CONNECTICUT
MAY 26, 1969

MOTION TO DISMISS FOR FAILURE TO FILE ASSIGNMENT OF ERRORS

1. On February 5, 1969, the Superior Court for Tolland County, Judge Barber, issued a temporary injunction against defendant Jack Roach.

2. On February 19, 1969, the defendant purportedly appealed to the Supreme Court of Connecticut pursuant to Section 52-265a of the General Statutes revised to date, alleging *inter alia* that his cause involved a substantial public interest and that delay would work a substantial injustice.

3. On February 27, 1969, Chief Justice King denied said "purported appeal" pursuant to said Section 52-265a.

4. Since that date the defendant has taken no further steps to perfect his appeal pursuant to Chapter 902 of the General Statutes, revised to date.

Wherefore, the Plaintiff moves that the Court dismiss said appeal for failure to file an Assignment of Errors.

Plaintiff, State of Connecticut

ROBERT K. KILLIAN
Attorney General

JOHN G. HILL, JR. (s)
by John G. Hill, Jr.
Asst. Attorney General

LIBRARY
SUPREME COURT, U. S.
JUN 12 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1383

JACK L. ROACH,

Petitioner,

—v.—

STATE OF CONNECTICUT,

Respondent.

PETITIONER'S REPLY BRIEF

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y. 10010
Attorney for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1383

JACK L. ROACH,

Petitioner,

—v.—

STATE OF CONNECTICUT,

Respondent.

PETITIONER'S REPLY BRIEF

In the compelling First Amendment context of this case, the ostensible procedural deficiencies asserted by respondent are inadequate to foreclose review in this Court of petitioner's federal constitutional claims. See *NAACP* v. *Alabama,* 357 U.S. 449 (1958); 377 U.S. 288 (1964).

On February 5, 1969, when the temporary injunction was issued by the trial court, petitioner immediately moved orally that the injunction be made permanent (T. 103) so that he could take his appeal as of right to the Supreme Court of Connecticut under Sec. 52-263, Conn. Gen. Stats. The motion was denied from the bench (*ibid.*). Petitioner then had three alternatives: (1) follow the regular course of "commonplace type of litigation" (Motion of Respondent to Dismiss, p. 2) by filing an answer to the complaint, await setting of a trial date, undergo another trial on the issues, take an appeal to the Connecticut Supreme Court, await its decision, file a petition for certiorari here, and all the

time labor under the sweeping terms of the injunction; (2) speak out on the public issues concerning the University at the peril of being subjected to prosecution for contempt of the sweeping terms of the injunction and run the risk that, under the uncertain terms of *Walker* v. *Birmingham,* 388 U.S. 307 (1967), he would be unable to challenge the terms of the injunction on constitutional grounds; (3) apply for the extraordinary appeal to the Supreme Court of Connecticut under Section 52-265a, Conn. Gen. Stats., hope that the appeal would be granted, and in the meantime hold his tongue in the expectation that the perfectly obvious constitutional defects of the injunction would be recognized by the Supreme Court of Connecticut and swiftly rectified.

Petitioner chose the last alternative because it promised to accommodate most satisfactorily petitioner's interest in securing the swiftest determination of his First Amendment claims and the competing interest in "orderly judicial review." *Walker* v. *Birmingham, supra* at 320.

However, the Supreme Court of Connecticut defeated petitioner's reasonable expectation that it would recognize that his appeal involved "a matter of substantial public interest and in which delay may work a substantial injustice." Under the circumstances, a petition for certiorari to this Court is appropriate because the order of the Chief Justice of the Supreme Court of Connecticut, denying the application for a Sec. 52-265a appeal, is a "final" judgment rejecting as insubstantial the federal constitutional questions raised by petitioner.

Walker v. *Birmingham, supra,* read together with *Carroll* v. *President and Commissioners,* 393 U.S. 175 (1968), raises

the substantial federal question whether in a case where the First Amendment is intimately involved in the terms of a temporary injunction issued by a state court, state finality rules can effectively be used to delay or frustrate review by this Court.

This case is the other side of *Carroll* coin. This Court decided in *Carroll,* in the interest of the First Amendment rights involved, that the temporal expiration of an *ex parte* injunction could not defeat this Court's power to review its constitutionality because "The underlying question persists . . . " 37 U.S. Law Week at 4042. In the case at bar the underlying question also persists—not because the issue is moot, but because the state will not allow it to become final.

The Court's disposition of the mootness problem in *Carroll* was said to be "particularly appropriate in view of this Court's decision in *Walker* v. *Birmingham* . . . " 37 U.S. Law Week at 4042. It is no less appropriate here, because the threat of *Walker* compels petitioner to obey the terms of an injunction which is self-evidently unconstitutional, but in doing so, as the State would have it, petitioner must also sacrifice for an extended period of time his right to engage in public discussion of important political issues.

The characterization by the State of this case as "a procedurally commonplace type of litigation" is the fundamental misconception upon which its claims must founder. First Amendment rights are "preferred" not "commonplace" and compliance with artificial state procedural rules which may be required in "commonplace" litigation, will not be allowed to interfere with vindication of First Amend-

ment rights. *NAACP* v. *Alabama*, 357 U.S. 449 (1958); 377 U.S. 288 (1964).*

CONCLUSION

For the reasons set forth above and in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y. 10010
Attorney for Petitioner

June 12, 1969

---

* Respondent's reference to the recent motion to dismiss it filed in the Supreme Court of Connecticut (Respondent's Motion to Dismiss, p. 8) ought not confuse the Court. There is in fact no appeal now pending in the Supreme Court of Connecticut since the Chief Justice's denial of petitioner's appeal under Sec. 52-265a concluded that procedure. Nor can petitioner take any steps in the Supreme Court of Connecticut to "perfect his appeal pursuant to Chapter 902," the commonplace type of appeal, because such an appeal can be perfected only after the injunction is made permanent. Petitioner has filed in the Supreme Court of Connecticut a memorandum in opposition to the State of Connecticut's motion to dismiss pointing out these inaccuracies.